No. 12900

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING,
Appellants,

vs.

TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

ADDENDUM TO APPELLEE'S BRIEF

That Congress has not made a radio station a federal instrumentality appears in the Communications Act of 1934, 47 U.S.C. 606 (f). This section specifies that section 606 (c), which empowers the President to regulate or take over the use or control of any radio station in time of war or disaster, shall not be construed to amend, repeal, impair, or affect "existing laws or powers of the States in relation to taxation," except in respect of government communications. The word "States" includes Territories, as provided in section 153 (v).

Dated at Honolulu, T. H., this 22nd day of August, 1952.

Respectfully submitted,

Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General
Attorney for Appellee.

F. Congress has not preempted the field. The argument that Congress has preempted the field to the exclusion of state and territorial taxation (Br. 50, 62) is contrary to the rule that a congressional grant of immunity from state or territorial taxation will not be implied and exists only when granted in plain terms.[74] Appellants' argument is similar to that rejected by this Court when it held that the comprehensive system of congressional regulations for the payment of seamen's wages do not preempt the field to the exclusion of Alaskan tax withholding.[75]

G. Intrastate business need not be separable from interstate commerce; cases of flat license fees must be distinguished. The inseparability of the intrastate communications from interstate commerce is of no significance. The intrastate business may be taxed even though it could not be discontinued without also discontinuing interstate commerce, and so long as the tax is not shown to in fact force the discontinuance of interstate commerce. This was established in *Pacific Tel. & Tel. Co. v. Tax Commission, supra,* 297 U.S. 403, 414-417. The case rules out conjectures (Br. 50) that if the present two and one-half per cent tax were sustained it could be raised to ten per cent; each case is to be dealt with on the facts. The case also is important because it supersedes the decision in the *KVL case, supra,* which had failed to distinguish between flat license fees and taxes measured by receipts. The court said:

> "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable. In cases relied upon by appellants there are expressions which may seem to support that

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[74] *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342, 365-366; *Yerian* v. *Territory,* 130 F. 2d 786, 789-790, aff'g 35 Haw. 855, 875-876.

[75] *Alaska S.S. Co.* v. *Mullaney,* 180 F. 2d 805, 812-814 (C.A. 9th).

contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only.***"

(297 U.S. at pp. 415-416.)

"***It is true that in *Sprout v. South Bend,* 277 U.S. 163, 171, the Court, when reciting the essentials of a valid license fee for doing local business, said that it must appear 'that the person taxed could discontinue the intrastate business without withdrawing also from the interstate.' But that statement was made in discussing the validity of a flat bus license fee,***"

(297 U.S. at p. 416.)

"The Telephone Company***makes no claim that the tax laid upon it in fact burdens interstate commerce. Nor could it do so. ***Not only is the intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate."

(297 U.S. at p. 417.)

H. **The holding of a federal license is not material.** It is not material that the federal government issues a license to the station, for the license does not convert KPOA into a federal instrumentality or confer immunity from state taxation.[76] A radio station does not resemble a national bank.[77]

CONCLUSION

This appeal cannot resolve the merits of the litigation. There is a narrow issue as to whether the action rightly

[76] *Federal Compress Co.* v. *McLean,* 291 U.S. 17, 22; *Broad River Power Co.* v. *Query,* 288 U.S. 178, 180.

[77] The distinguishing characteristic of a national bank is that it is a public corporation chartered by the United States to act as its agent. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 859-860; *McCulloch* v. *Maryland,* 4 Wheat. 316. That a radio station does not resemble a national bank is the inevitable result of the holding in *Whitmore* v. *Ormsbee, supra,* 329 U.S. 668, aff'g 64 F. Supp. 911, 916-917; as a further point in the *Whitmore* case it was held that a radio station must qualify under state laws, the Supreme Court citing on this point *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202.

was dismissed under the Johnson Act and the policy therein set forth, or whether it should have been held awaiting the outcome of litigation in the territorial courts under the rule of *Spector Motor Co. v. McLaughlin, supra.* Since the dismissal was without prejudice nothing of substance is involved; moreover the Court was correct in applying the Johnson Act and its policy.

While appellee submits that an affirmance is in order, the precedent of *Georgia Railroad and Banking Co. v. Redwine, supra,* might be applied to defer disposition of this case pending final disposition of the similar litigation in the territorial courts.

DATED at Honolulu, T. H., this 9th day of April, 1952.

Respectfully submitted.

RHODA V. LEWIS
Deputy Attorney General
Attorney for Appellee.